Supreme Court, U.S.
FILED
AUG 23 1995
CLERK

No. 94-1985

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents do not dispute that the question presented in this case has substantial legal and practical importance. Rather, they contend that further review is not warranted because the court of appeals' decision is correct and is not in conflict with *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), or *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994). Respondents further contend that the interlocutory posture of the case makes review by this Court inappropriate.

As demonstrated in our petition for certiorari, however, the court of appeals' decision is fundamentally flawed and conflicts with *Tucker* and *City of Detroit*, which rejected challenges to the decision of the Secretary

of Commerce not to undertake a statistical adjustment to the 1990 census. Moreover, a detailed record concerning the Secretary's adjustment decision has already been developed, and the additional proceedings ordered by the court of appeals are very unlikely to assist this Court in resolving the question presented.

1. In our petition for certiorari, we explain that the court of appeals erred in (1) focusing on the total numeric accuracy of the census figures at the national level rather than on the distributive accuracy of the adjusted and unadjusted numbers, and (2) invoking heightened scrutiny on the ground that the unadjusted census figures resulted in a differential undercount of minorities, even though there was no showing or finding of intentional discrimination. See Pet. 20-26. Tellingly, respondents make no effort to defend either of those bases for the holding below. See Br. in Opp. 38-42, 49-52.[1] Respondents instead deny that those propositions even played a role in the court of appeals' analysis. Thus, they argue (Br. in Opp. 41-42) that the court of appeals did not itself express a preference for numeric accuracy over distributive accuracy, and they dispute our contention that the court of appeals' analysis is inconsistent with *Washington* v. *Davis*, 426 U.S. 229 (1976), which held that establishment of an equal protection violation based upon racial discrimination requires proof of discriminatory purpose. Br. in Opp. 49; see Pet. 24. According to respondents (Br. in Opp. 47-48), the court of appeals merely applied to the federal government the requirement that state officials conducting redistricting must

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[1] Indeed, respondents acknowledge (Br. in Opp. 39) that "distributive accuracy is the object of adjustment" and that "[t]he parties' dispute * * * was not over whether distributive accuracy was the appropriate criterion."

make "a good-faith effort to draw districts of equal population," and that the burden shifts to the government to justify any failure to do so. *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983). Respondents are simply wrong in their characterization of the decision below.

Although the court of appeals did recite the *Karcher* standard, see Pet. App. 36-37,[2] its application of that standard was seriously flawed. First, the court of appeals ignored this Court's admonition that Congress's "apparently good-faith choice of a method of apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard." *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 464 (1992); see Pet. 21-22. Moreover, in concluding that the Secretary's decision against adjustment "did not reflect an effort to achieve equality as nearly as practicable," the court of appeals placed almost exclusive reliance on the facts that the Secretary "valued 'distributive accuracy' over numerical accuracy," and that the contemplated adjustment "would lessen the disproportionate undercounting of minorities." Pet. App. 38; see also *id.* at 4 ("We vacate and remand for the [district] court to determine whether the Secretary's decision not to make an adjustment in order to improve the overall count and reduce the disproportionate undercounting of minority groups was essential to the achievement of a legitimate governmental interest."); *id.* at 39 ("the Secretary did not make the required effort to achieve numerical accuracy as nearly as practicable").

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[2] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the State of Wisconsin in No. 94-1614.

Thus, the court's application of the *Karcher* standard unquestionably rested on the numeric accuracy of the adjusted census figures at the national level, and it ignored this Court's holding that racially disparate impact, unconnected to any showing of discriminatory purpose, is insufficient to establish an equal protection violation.

In order to make out a prima facie case under *Karcher*, a plaintiff must show that state officials did not make a good faith effort to achieve equality as nearly as practicable among congressional districts. See 462 U.S. at 730. By parity of reasoning, a plaintiff must show, as a threshold matter, that the Secretary did not make a good faith effort to achieve equality of voting power as nearly as practicable among the States. In other words, the plaintiff must show the lack of a good faith effort to maximize distributive accuracy. Respondents failed to make that showing in two respects. First, they do not deny that the Secretary's extraordinary undertaking in conducting the census itself (see Pet. 3-4, 25 & nn.22 and 23) satisfied any applicable standard of good faith. Second, as the court of appeals appeared to recognize (see Pet. App. 38), respondents did not establish that the distributive accuracy of the adjusted figures was superior to that of the unadjusted figures.

2. Respondents argue that the proposed adjustment would have increased the distributive accuracy of the census. They contend as well that the Secretary implicitly conceded the superior distributive accuracy of the adjusted figures. Those arguments are without merit.

a. In explaining his decision against adjustment, the Secretary acknowledged the "diversity of opinion among [his] advisors." Pet. App. 140; see Pet. 7. After consideration of those competing views, however, the

Secretary concluded that "the evidence provided by the Census Bureau tends to support the superior distributive accuracy of the actual enumeration." Pet. App. 185. The district court carefully examined the administrative record and conducted a lengthy trial, and it concluded that the Secretary "was neither arbitrary nor capricious" in determining that the superior distributive accuracy of the adjusted figures had not been demonstrated. *Id.* at 77. Respondents have not challenged that holding in the court of appeals or in this Court. Their discussion of technical features of selected data in the administrative record (see Br. in Opp. 18-22) is consequently beside the point.

b. Respondents also contend that the Secretary

> conceded that the 'PES-adjusted estimates reflect more accurately the total population *and the racial and ethnic populations of the country*.' With that concession, the Secretary also conceded (albeit tacitly) that, *ceteris paribus*, adjustment would improve the *distributive* accuracy of the census.

Br. in Opp. 43 (quoting Pet. App. 146) (emphasis supplied in Br. in Opp.). But the Secretary's statement that the adjusted estimates "reflect more accurately the total population and the racial and ethnic populations of the country" (Pet. App. 146) plainly refers to population data at the national level. The Secretary recognized that the adjusted census figures would more accurately estimate the country's total minority population. He did not suggest—much less concede—that the adjusted numbers would more accurately estimate the actual distribution of the (minority and non-minority) population among the various States and political subdivisions.

c. Respondents assert that "[b]ecause members of minority groups are not evenly distributed geographi-

cally, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received." Br. in Opp. 9. In support of that assertion, they cite (*ibid.*) the testimony of two witnesses who stated, in conclusory terms, that the undercount would have that effect in local areas or among districts within a State. See Tr. 92, 1197-1198. Respondents made no comprehensive effort at trial, however, to demonstrate whether and to what extent States with large minority populations would have been credited with higher shares of the country's population if the proposed adjustment had been made, let alone to demonstrate that their share of the population would have been *more accurately* estimated by use of adjusted figures. [3]

Respondents' basic argument is that if use of an adjustment would alleviate the racially differential undercount at the national level, then, "*ceteris paribus*, adjustment would improve the *distributive* accuracy of the census." Br. in Opp. 43. The flaw in that argument lies in its premise ("*ceteris paribus*") that other things would remain equal—that the proposed statistical adjustment would lessen the racial disparity without introducing new errors or uncertainties into the enumeration. After extensive consideration of the views of experts on both sides of the adjustment question, the Secretary reached a dif-

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[3] The only constitutionally mandated use of census data at issue in this case is in the apportionment of Representatives among the States. The drawing of congressional, state legislative, or other districts within a State is the responsibility of state or local officials, and does not furnish grounds for seeking an adjustment of census data or other relief against federal officials. See *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1372-1374 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217 (1994).

ferent conclusion. He noted that he was "deeply troubled by this problem of differential participation and undercount of minorities," but concluded that "an adjustment does not address this phenomenon without adversely affecting the integrity of the census." Pet. App. 139.[4]

3. Respondents contend (Br. in Opp. 52-60) that the decision below does not conflict with *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), or *City of Detroit* v. *Franklin*, 4 F.3d 1367 (6th Cir. 1993), cert. denied, 114 S. Ct. 1217(1994). Respondents are incorrect. As in this case, the plaintiffs in both *Tucker* and *City of Detroit* sought a judicial order requiring the Secretary to undertake a statistical adjustment of the census. *Tucker*, 958 F.2d at 1418; *City of Detroit*, 4 F.3d at 1375-1378. The courts in *Tucker* and *City of Detroit* entered judgment for the government, holding that Article I, Section 2, Clause 3 of the Constitution "does not authorize lawsuits founded on disagreement with the Census Bureau's statistical

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[4] Respondents also suggest (Br. in Opp. 51 n.9) that the proposed adjustment was warranted because it would have shifted seats in the House of Representatives from Wisconsin and Pennsylvania, which allegedly have "a disproportionately white population and lower-than-average undercount," to California and Arizona, which have "a disproportionately non-white population and greater-than-average undercount." But the fact that California and Arizona have greater-than-average minority populations does not mean that the proposed adjustment is constitutionally required. Even very small changes in the assumptions utilized in developing the adjustment methodology would have resulted in different allocations of seats in the House of Representatives. As the Secretary explained in his decision, "[o]ne expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." Pet. App. 142; see also 958 F.2d at 218. Id.

methodology" because such lawsuits "invoke[] no judicially administrable standards." *Tucker*, 958 F.2d at 1418; accord *City of Detroit*, 4 F.3d at 1376-1378. Here, by contrast, the court of appeals concluded that the Secretary had failed to make a good-faith effort to achieve equality of representation, thereby giving rise to a heightened burden of justification.[5]

Respondents contend (Br. in Opp. 57) that *Tucker* and *City of Detroit* are distinguishable because the adjustments sought in those cases were "local" in character, while respondents are seeking a nationwide adjustment. But the decisions in *Tucker* and *City of Detroit* did not turn on the geographical scope of the requested adjustments. In any event, had *Tucker* or *City of Detroit* resulted in an order compelling an adjustment, the Secretary could not realistically have limited the adjustment to the areas covered by those lawsuits. As the Sixth Circuit recognized, "[p]laintiffs' request for a statistical adjustment for Michigan alone cannot be considered in

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[5] Respondents suggest (Br. in Opp. 56, 60) that the decision below is not in conflict with *Tucker* or *City of Detroit* because those cases did not present claims under the Fifth Amendment. But the Seventh Circuit in *Tucker* expressly recognized that a disproportionate undercounting of minorities, in the absence of intentional discrimination, provides no basis for heightened judicial scrutiny under the Fifth Amendment. 958 F.2d at 1413-1414; see also *id.* at 1418. The court further explained that the intrastate redistricting cases—cases on which the court of appeals in this case relied (see Pet. App. 26-37) in concluding that heightened scrutiny of the Secretary's decision was warranted—are irrelevant to the adjustment question because they involve the judicially manageable task of "decree[ing] equality," rather than "tak[ing] sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount." 958 F.2d at 1418. Accord *City of Detroit*, 4 F.3d at 1378.

isolation. It would be impractical for this Court to order ([and] the Secretary to do) such an adjustment without considering the consequences for the other states and other cities." *City of Detroit*, 4 F.3d at 1378. The Sixth Circuit accordingly concluded that "what plaintiffs' request really comes down to is a nationwide adjustment," which, the Sixth Circuit noted, had already been rejected by the district court in the instant case. *Ibid.*

4. The fact that the decision below is interlocutory does not render review by this Court inappropriate. Although the Court ordinarily does not review interlocutory decisions, it has done so where the question presented is significant and its resolution is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); see also *Estelle* v. *Gamble*, 429 U.S. 97 (1976).

As explained in our petition (Pet. 27), the question whether the Constitution requires an adjustment to the 1990 census has substantial national significance. Resolution of the adjustment issue at this time would remove the potential for uncertainty in the 1996 presidential and congressional elections. See Pet. 29. Moreover, it is exceedingly unlikely that the proceedings on remand would assist the Court in resolving the question presented. The Secretary's decision was based largely on three determinations: (1) distributive rather than total numeric accuracy should be given paramount importance in deciding whether to undertake an adjustment; (2) the unadjusted census figures should be treated as the most accurate unless adjusted estimates were shown to be better; and (3) the adjusted figures had not been shown to improve distributive accuracy. See Pet. 15, 29. As we

explain in our petition (Pet. 29), an extensive factual record is not needed to resolve whether the first two determinations were "consistent with the constitutional goal of equal representation," *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2777 (1992), and the district court has already concluded, based on a thorough review of the administrative record and the evidence introduced during a lengthy trial, that the third determination was not arbitrary or capricious—a conclusion that respondents have not called into question in the court of appeals or in this Court. Finally, the court of appeals' decision ordering a remand rests on two factors—numeric accuracy and the disproportionate undercount of minorities—that respondents do not defend as grounds for invoking heightened scrutiny. Accordingly, review by this Court is warranted now.[6]

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[6] Respondents state (Br. in Opp. 34) that "[t]he present state of the record * * * requires at least some modest additions" and suggest that review by this Court therefore would be premature. But the only alleged deficiency in the record that respondents identify (Br. in Opp. 34-35) relates to the Commerce Department's current views as to the best estimate of the total national undercount. Formal evidence of the Department's current views on that question is unnecessary for this Court to resolve whether the Secretary's adjustment decision satisfied the requirements of the Constitution. That is so because the constitutionality of the Secretary's decision should be determined on the basis of the record that was before him at that time, and because that decision appropriately turned on an assessment of distributive rather than numeric accuracy. In any event, evidence of the Census Bureau's revisions to the undercount following the Secretary's decision was presented at trial over respondents' objection. Tr. 1777-1792.

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For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1995